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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5885

DANIEL JOSEPH PORTLEY, Petitioner

vs.

LAWRENCE GROSSMAN, WARDEN, AND

UNITED STATES PAROLE COMMISSION, Respondents

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Petitioner, Daniel Joseph Portley, pursuant to U.S. Sup. Ct. Rule 53 and 18 U.S.C. § 3006A(d)(6), requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel in the United States District Court for the central district of California and on ap-

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peal to the United States Court of Appeals for the Ninth Circuit.

DATED: January 2, 1980.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

DANIEL JOSEPH PORTLEY, Petitioner

vs.

LAWRENCE GROSSMAN, WARDEN, AND

UNITED STATES PAROLE COMMISSION, Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on September 14, 1979.

OPINION BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A hereto.

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit was entered in September 14, 1979. On December 6, 1979, the Order denying Petitioner's timely Petition For Rehearing and Suggestion For Rehearing En

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Banc was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner was denied a full and timely parole revocation hearing.

2. Whether the United States Parole Commission jurisdiction over Petitioner terminated prior to the date of execution of the parole violator warrant (May 31, 1978).

3. Whether the United States Parole Commission erroneously considered Petitioner's 1972 Dyer Act conviction in computing his new sentence.

4. Whether the use of current reparole guidelines in determining Petitioner's parole violator sentence violates the Constitutional prohibition against ex post facto laws.

CONSTITUTIONAL PROVISION INVOLVED

Article 1, Section 9, Clause 3 of the United States Constitution: "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

A. Nature of the Case

On November 15, 1978, Judgment was entered in the trial court granting in part Petitioner's Petition for Writ of Habeas Corpus, ordering that the United States Parole Commission (hereinafter "Commission") reconsider and determine Petitioner's eligibility for reparole under the standards for reparole in effect when Petitioner was sentenced in April 1972. In all other respects, the Petition for Writ of Habeas Corpus was denied. [CT 123]

On December 7, 1978, Respondents filed a Notice of Appeal of the portion of the judgment granting Petitioner's Petition for Writ of Habeas Corpus. [CT 124-126] On December 13, 1978, Petitioner filed a Notice of Cross Appeal of the por-

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tion of the judgment denying his Petition. [CT 127-129] On February 12, 1979 the district court entered an order staying execution of the judgment pending appeal and further ordered Petitioner's release on his own recognizance pending the appeal. On September 14, 1979, the Memorandum Opinion of the United States Court of Appeals for the Ninth Ciruit ("Ninth Circuit") was filed reversing that portion of the judgment granting Petitioner relief against the Commission and affirming that portion of the judgment denying Petitioner's Petition for Writ of Habeas Corpus. On or about September 26, 1979, Petitioner's Petition For Rehearing and Suggestion For Rehearing En Banc was filed. The Order denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed in the Ninth Circuit on December 5, 1979.

B. The Proceedings and Disposition in the Lower Courts

In November 1977, Petitioner filed his first Petition for Writ of Habeas Corpus by a Person in Federal Custody, claiming that certain time spent in state custody in 1970-1971 should have been credited to his federal convictions and sentencings on September 27, 1971. [CT[1/] 36-44] This petition was dismissed on March 1, 1978. [CT 106:7] On June 20, 1978, the Ninth Circuit Court of Appeals dismissed Petitioner's appeal. However, the order of dismissal specified that Petitioner was not precluded from filing a separate and further petition on additional issues. [CT 106:8-11;

1/ CT refers to the Clerk's Transcript.

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AR[2]/Exhibit 20 to Petition for Writ of Habeas Corpus filed July 27, 1978]

On July 27, 1978 Petitioner, in propria persona, filed a new Petition for Writ of Habeas Corpus by a Person in Federal Custody, together with Argument, Points and Authorities, and Exhibits in Support of Petition for Writ of Habeas Corpus filed on July 28, 1978 (hereinafter referred to as the "Petition"). [CT 1-23] The Petition raised the following issues:

1. Petitioner was denied a full and timely parole revocation hearing in violation of his statutory and constitutional protections;

2. The United States Parole Commission should not have considered Petitioner's conviction and sentence in Case No. S-1997 (April 6, 1972 Dyer Act conviction) at the parole revocation hearing;

3. Petitioner's credits for County Jail confinement time were not properly applied, thus denying Petitioner his rights to equal protection of the law; and

4. The date set for reparole constituted excessive punishment, prohibited by the Eighth Amendment of the United States Constitution.

On July 31, 1978, United States Magistrate Venetta S. Tassopulos issued an Order to Show Cause requiring a response to the Petition. [CT 24-25] Respondents' Response in Opposition to Petition for Writ of Habeas Corpus; Memorandum of

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2/ AR refers to the Augmented Record submitted on appeal through stipulation of the parties. The Augmented Record consists of the twenty-six (26) exhibits attached to Petitioner's July 21, 1978 Petition For Writ of Habeas Corpus which exhibits were inadvertently omitted from the Clerk's Transcript.

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Points and Authorities; Declaration of Eric L. Dobberteen; Exhibits were filed on August 21, 1978. [CT 26-64] On September 5, 1978, Petitioner filed his Traverse to Respondents' Response in Opposition to Petitioner's Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities; Additional Exhibits and Declaration of Petitioner. [CT 65-102]

On November 15, 1978, Magistrate Tassopulos filed a Report and Recommendation of Magistrate [CT 103-120] (a copy of which is attached hereto as Appendix B) which recommended that the Petition be denied in all respects except on the ground that Petitioner's new parole violator term was excessive, and, therefore, in violation of the Eighth Amendment. Specifically, Magistrate Tassopulos stated:

> "[C]urrent Commission guidelines may not be used to determine reparole eligibility of persons sentenced prior to May 14, 1976, the effective date of the 1976 Parole Commission and Reorganization Act."
> CT 118:11-14.

On November 15, 1978, Honorable Laughlin E. Waters' Order Adopting Report and Recommendation was filed, concurring with and adopting the findings and conclusions of Magistrate Tassopulos. [CT 121-122] Judgment was entered on November 15, 1978 which provided:

> "IT IS ADJUDGED that the United States Parole Commission shall reconsider and determine petitioner's eligibility for reparole under the standards for reparole in effect when petitioner was sentenced in April, 1972. In all other respects the petition for writ of habeas corpus is denied."

/ / /

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On September 14, 1979, the United States Court of Appeals for the Ninth Circuit filed its Memorandum Opinion (i) reversing the partial grant of Petitioner's Petition for Writ of Habeas Corpus to the extent that the judgment granted Petitioner relief against the Commission, and (ii) affirming the denial of Petitioner's Petition for Writ of Habeas Corpus in all other respects. On or about September 27, 1979, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc with the Ninth Circuit Court of Appeals. On December 5, 1979, the Order of the Ninth Circuit was filed denying Petitioner's petition for rehearing and rejecting the suggestion for rehearing en banc.

C. Statement of Facts

On September 27, 1971, after entering a plea of guilty, Petitioner was sentenced in the United States District Court for the Central District of California, Case No. 8410[3/] to a term of ten years for violation of 18 U.S.C. § 495 (forgery and uttering forged treasury check) and 18 U.S.C. § 1708 (unlawful possession of check). Execution of the sentence was suspended and Petitioner was placed on probation for a period of four years. [CT 14; AR/Exhibit 6 to Petition]

On April 6, 1972, after a plea of guilty, Petitioner was sentenced in the United States District Court for the Eastern District of California, Case No. S-1997, for violation of 18 U.S.C. § 2312 (interstate transportation of stolen vehicle). [CT 15; AR/Exhibit 9 to Petition] Petitioner received the following sentence:

3/ This case was later docketed as Case No. S-2030 in the United States District Court for the Eastern District of California after it was transferred to the Eastern District for a probation violation and consolidated with Case No. S-1997 (Dyer Act violation).

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"[F]or a period of FOUR (4) YEARS and that the defendant shall become eligible for parole at such time as the Board of Parole man [sic] determine pursuant to the provisions of Title 18 USC, Section 4208(a)(2)."

Judgment and Commitment Order, AR/Exhibit 9 to Petition.

Additionally, Petitioner's probation was revoked in Case No. S-2030. Petitioner's original ten year sentence was modified to six years and it was ordered to run concurrently with the sentence imposed in Case No. S-1997. [CT 15, AR/Exhibit 8 to Petition] Petitioner was immediately remanded to the custody of the Attorney General. [AR/Exhibit 10 to Petition] Thereafter, a sentence computation record prepared by the Bureau of Prisons indicated that Petitioner's sentence on Case No. S-2030 (Dyer Act) would expire "full term" on April 5, 1976 and his modified original sentence under S-1997 (Forgery) would expire "full term" on February 16, 1978. [CT 15; AR/Exhibit 10 to Petition]

On July 1, 1974, Petitioner was released on parole. At that time, Petitioner's parole expiration date was set at February 16, 1978, indicating a total of 1,146 days remaining to be served. [CT 15, AR/Exhibit 11 to Petition]

On March 30, 1977, while on parole, Petitioner was arrested by California State authorities (Santa Ana Police Department) on a charge of assault with a deadly weapon. [CT 15, AR/Exhibit 12 to Petition] On June 21, 1977, Petitioner plead guilty to misdemeanor charges of drawing, exhibiting or using a firearm in self-defense (California Penal Code § 12021)

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and he was fined $200 and placed on summary probation. [CT 15, AR/Exhibit 13 to Petition][4/]

On June 6, 1977, a U.S. Probation Office Violation Report was filed charging Petitioner with a violation of his parole solely by virtue of his arrest on March 30, 1977. [CT 15, AR/Exhibit 12 to Petition] Moreover, the Report recommended that "no action be taken at this time; pending final disposition in county." [AR/Exhibit 12 to Petition]

Although the Violation Report was issued on June 6, 1977, and Portley was convicted and sentenced on June 21, 1977, a warrant application [AR/Exhibit 13 to Petition] was not filed and a warrant [AR/Exhibit 15 to Petition] was not issued until August 29, 1977, sixty-nine days after Petitioner's conviction. Petitioner was not in custody and he was readily available for retaking by the federal authorities throughout this period.

On August 25, 1977, Petitioner was arrested by California State authorities (Santa Anna Police Department) on charges of possession of a firearm (California Penal Code § 12021) and receiving stolen property (California Penal Code § 496). On August 26, 1977, Petitioner was booked in the Orange County Jail.[5/] [AR/Exhibit 14 to Petition] After his ar-

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4/ Since there was no evidence presented to the contrary, the Report and Recommendation of Magistrate was erroneous in stating:

"On June 21, 1977, following his plea of guilty to this charge [assault with a deadly weapon], petitioner was fined one hundred dollars and placed on a three year summary probation." CT 104:16-18

5/ Although Petitioner was arrested and taken into custody on the firearm and stolen property charges on August 25 and August 26, 1977, respectively, the warrant application and warrant issued on August 29, 1977 did not refer to the new charges. Although the subsequent Riverside burglary conviction was included in a supplemental warrant application, the Commission apparently never considered the Orange County charges. [CT 7-53; 55-56]

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rest, Petitioner was later charged with additional burglaries in Riverside County.

As a result of a "no bail detainer" set by the parole violator warrant issued on August 29, 1977, Petitioner remained in state custody from August 26, 1977 to May 30, 1978. [CT 76:7-9] The warrant was never executed during this entire nine-month period.

On May 30, 1978, Petitioner was convicted on his plea of guilty to four counts of burglary occurring in Riverside County. [CT 16, AR/Exhibit 25 to Petition] Since execution of Petitioner's sentence was stayed and probation granted for five years, [AR/Exhibit 17 and 25 to Petition] Petitioner never served a sentence on this charge.6/

On May 31, 1978, the day set for Petitioner's release from Orange County jail, the warrant, previously issued on August 29, 1977 and relating solely to Petitioner's misdemeanor conviction of June 21, 1977, was executed. [CT 15, AR/Exhibit 15 to Petition]

On June 9, 1978, supplemental parole violation charges were filed against Petitioner alleging his May 30, 1978 burglary conviction in Riverside County. [CT 57; AR/Exhibit 18 to Petition] Although the supplemental charges were annexed to the original warrant issued on August 29, 1977, Petitioner did not have notice of the supplemental charges when the warrant was executed on May 31, 1978. As demonstrated from Petitioner's uncontradicted Traverse, [CT 65-88] Petitioner "was served said supplemental warrant application just days prior to said revocation hearing without time to prepare for an adequate defense." [CT 72:21-23]

6/ Petitioner entered a plea of guilty to the Orange County charges on July 7, 1978. [CT 17:1-3] Accordingly, Petitioner's Orange County conviction was not considered at the June 20, 1978 parole revocation hearing.

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On June 20, 1978, Petitioner's parole revocation hearing was held, ten months after the date of issuance of the August 29, 1977 warrant. At the hearing, the Commission considered Petitioner's misdemeanor conviction on June 21, 1977 (drawing, exhibiting or using a firearm in self-defense) [CT 47-48; 55] and Petitioner's Riverside burglary conviction on May 30, 1978. [CT 48-49;55]

As set forth in the Commission Hearing Summary, the recommedations of the Panel were as follows:

"1. Revoke Parole.

2. None of the time spent on parole shall be credited.

3. Examiner Dwyer: Continue to expiration.

3. [sic] Examiner Stoops: Continue to a Presumptive Parole on June 20, 1980, via community treatment center."

CT 52-53.

Although there was a dispute as to whether Petitioner's cooperation with Orange County authorities in connection with the Riverside burglary convictions (Violation 2 on the warrant application) was properly taken into account by the Panel at the parole revocation hearing, [CT 5; 28-29; 73-74] the Hearing Summary is clear in this regard:

"Also, Orange County Authorities have not provided any information as to the degree of cooperation subject has provided that jurisdiction, and he notes that subject only becomes cooperative after he has been found to have been involved in criminal activities. Subject's cooperation is nearly always based upon what benefits he can derive rather than

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assuming responsibilities for his actions. Examiner Stoops shares the same concerns as Examiner Dwyer, however, he believes that subject should be given a Presumptive Parole at the bottom of the reparole guidelines or after the service of 34 months. Both Examiners feel that some consideration should be given for subject's cooperations once it has been verified and the extent of his cooperation has been determined."

CT 52.

The record also demonstrates that Petitioner attempted to verify his cooperation with state authorities by soliciting letters from Orange County Deputy Public Defenders Gregory W. Jones and Peter Bumerts [AR/Exhibit 19 and 20 to Petitioner] and Orange County Deputy District Attorney Reilly. [CT 90] However, said letters of verification were not dated until June 28 and 30, and July 28, 1978, respectively, days after the parole revocation hearing.

Whether any consideration was in fact given to Petitioner's cooperation cannot be gleaned from the record in that the Notice of Action dated July 14, 1978 [CT 55-56] fails to refer to this factor. However, as the Notice of Action indicates that the recommendations of the panel were followed, it is apparent that in fact the letters regarding Petitioner's cooperation were never taken into consideration.

The parole action ordered as a result of the parole revocation hearing on June 20, 1978 was as follows:

"1. Revoke parole

2. None of the time spent on parole shall be credited

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3. Continue to presumptive parole on August 20, 1978,[7/] via community treatment center."

Notice of Action, CT 55.

The Notice of Action clearly demonstrates that the law in effect at the time of the parole revocation hearing, and not the law in effect when Petitioner's original sentence was imposed, was utilized in the reparole determination:

"Reparole Guidelines (28 CFR 2.21) indicate a customary range of 34-44 months to be served before re-release: After review of all relevant factors and information presented, a decision outside the guidelines does not appear warranted."

CT 56.

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7/ The June 20, 1978 Sentence Computation Record [AR/Exhibit 26 to Petition] provides for a mandatory release date of May 5, 1980, months prior to the presumptive parole date of August 20, 1980 specified in the Notice of Action. As these dates are clearly incongrous, Magistrate Tassopulos recommended that on reconsideration the Commission set a reparole date prior to the mandatory release date. [CT 119:1-4; 120:1-3]

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REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS NOT AFFORDED A FULL AND TIMELY PAROLE REVOCATION HEARING.

A. The Parole Violator Warrant was not Issued "As Soon As Practicable," in Violation of Petitioner's Statutory and Constitutional Rights.

The parole violator warrant initiating Petitioner's parole revocation proceedings was not issued until August 29, 1977. [CT 15-16, AR/Exhibit 15 to Petition; 104:23-24] Petitioner's conviction in Orange County for drawing or exhibiting a firearm in self defense, which constituted the sole probable cause for the issuance of the warrant, occured in June 21, 1977, sixty-nine days prior to the issuance of the warrant.

18 U.S.C. § 4213, the governing statute with respect to the issuance of warrants, provides in pertinent part:

> "(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parole charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge." (Emphasis added)

28 C.F.R. § 2.44 also requires the issuance of the warrant as soon as practicable:

> "(b) Any summons or warrant under this section shall be issued as soon as practicable after the alleged violation is reported to

the Commission, except when delay is deemed necessary. Issuance of a summons or warrant may be withheld until the frequency or seriousness of violations, in the opinion of the Commission, requires such issuance. In the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be withheld, or a warrant may be issued and held in abeyance pending disposition of the charge."

Although it is clear that the warrant must issue "as soon as practicable after discovery of the alleged violation," discounting the period the parolee was awaiting disposition of pending charges, there is no evidence in the record which would justify the sixty-nine day delay between the final disposition of Petitioner's conviction of June 21, 1977 and the issuance of the warrant on August 29, 1977.

Although the initial warrant application only charged the conviction of June 21, 1977, it is apparent that the triggering event prompting the Commission's issuance of the warrant on August 29, 1977 was Petitioner's arrest on August 25, 1977 in Orange County on charges of receiving stolen property and possession of a firearm. However, the new Orange County charges were not alleged in the initial warrant application of August 29, 1977 and were not charged in the supplemental warrant application dated June 9, 1978. More importantly, the charges were never considered at the parole revocation hearing of June 20, 1978.

If it was in fact Petitioner's arrest of August 25, 1977, that motivated the Commission to file the warrant, it should have alleged such charges so that Petitioner could have been afforded an immediate preliminary hearing to establish

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probable cause for the subsequent charges. However, the Commission chose to circumvent the requisite preliminary hearing by the simple expedient of utilizing Petitioner's prior misdemeanor conviction. The obvious devicivness of the Commission's action resulted in the intentional deprivation of Petitioner's right to a prompt determination of the parole violation charges, in violation of his rights provided by 18 U.S.C. § 4214 and Morrissey v. Brewer, 408 U.S. 471 (1972).

Moreover, Petitioner was available to the Commission from the date of his conviction on June 21, 1977, for which he was sentenced to summary probation, until August 25, 1977, when he was arrested on the Orange County receiving stolen property and possession of firearm charges. Accordingly, the Commission had absolutely no reason or justification to delay issuance of the warrant.

B. The One-Year Delay Between Petitioner's June 21, 1977 Conviction and the Parole Revocation Hearing on June 20, 1978 was in Violation of his Statutory and Constitutional Rights.

In the Report and Recommendation of Magistrate, Magistrate Tassopulos reviewed the applicable statutes and summarily dismissed Petitioner's argument relating to the timeliness of his parole hearing by relying on 18 U.S.C. § 4214(c) and concluding: "Thus, petitioner is incorrect in claiming that the hearing [June 20, 1978] was not timely." [CT 108] A careful analysis of the statutes relied on by Magistrate Tassopulos demonstrates that her reliance on the exception contained in 18 U.S.C. § 4214(c) was misplaced. Since the exception was inapplicable to Petitioner, he should have been afforded a hearing within sixty days of his June 21, 1977 misdemeanor conviction in accordance with 18 U.S.C. § 4214(a)(1).

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In response to the due process safeguards required by the Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972), 18 U.S.C. § 4214 was enacted to provide a process for consideration of parole revocation following the issuance of a summons or warrant. Specifically, 18 U.S.C. § 4214 provides in pertinent part:

> "(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or taken under section 4213 shall be accorded the opportunity to have-
>
> (A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without necessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which whall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:
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> (i) continuation of revocation proceedings is not warranted; or
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> (ii) incarceration of the parolee pending further revocation proceedings is not warranted by

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the alleged frequency or seriousness of such violation or violations;

(iii) the parolee is not likely to fail to appear for further proceedings; and

(iv) the parolee does not constitute a danger to himself or others.

(B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

* * *

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall

receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application." (Emphasis added)

Petitioner concurs with Magistrate Tassopulos' finding that he was not entitled to a preliminary hearing and that Petitioner's misdemeanor conviction of June 21, 1977 constituted sufficient probable cause under subsection (b)(1). However, Magistrate Tassopulos' reliance on subsection (c) which permits the Commission to avoid the requirement of a revocation hearing within sixty days after a determination of probable cause is inapplicable to Petitioner. 18 U.S.C. § 4214(c) provides:

"(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and unless

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waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section." (Emphasis added)

It is clear from the emphasized portion of subsection (c) that it is only applicable if the two requirements for a retaking under subsection (b)(1) are present. Although Petitioner concedes that the June 21, 1977 misdemeanor conviction satisfied the first element (conviction of a crime) of subsection (b)(1), the second requirement that he must be "serving a new sentence in an institution" was clearly not satisfied. Certainly, Petitioner's June 21, 1977 probationary sentence does not fulfill the requirement of "serving a new sentnce in an institution" as required by subsection (b)(1). Additionally, since the warrant issued on August 29, 1977 charged Petitioner solely with the June 21, 1977 conviction, the additional Riverside burglary charges contained in the supplemental warrant of June 9, 1978 are not relevant. Moreover, Petitioner's Orange County conviction was never charged or considered by the Commission since the conviction was not sustained until after the revocation hearing. In any event, Petitioner never served a new sentence in an institution because he received a probationary sentence in connection with all of the convictions. Petitioner's incarceration from August 29, 1977 to May 30, 1978 resulted not from a new sentence but was due to the no-bail detainer lodged against him by the Commission.

It is clear that the Commission attempted to deprive Petitioner of the required preliminary hearing for his August 25, 1977 arrest by charging Petitioner with the earlier misdemeanor conviction sustained on June 21, 1977. It is equally clear that the Commission erroneously relied on subsection (b)(1) to hold Petitioner on the apparent rationale that he had

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been convicted and was serving a "new sentence in an institution." However, the facts fail to support and cannot justify the Commission's action. Although Petitioner was convicted on June 21, 1977 he received probation. Thereafter, he was awaiting disposition of the new, unrelated charges and was not serving a new sentence as required by (b)(1). In the absence of Petitioner's serving a new sentence, subsections (b)(1) and (c) relied on by Magistrate Tassopulos were inapplicable to Petitioner. As a result of the inapplicability of subsections (c) and (b)(1) and the finding of probable cause on June 21, 1977, the Commission was required to proceed in accordance with subsection (a)(1) and afford Petitioner a revocation hearing within sixty days of the determintion of probable cause of the misdemeanor gun charge alleged in the warrant.

Assuming arguendo that the exception relied on by Magistrate Tassopulos was applicable and Petitioner was not entitled to a revocation hearing until ninety days after his retaking, the intervening nine-month delay in executing the warrant and retaking Petitioner violated the concepts of due process required by Morrissey v. Brewer, 408 U.S. 471 (1972).

The Magistrate's Report and Recommendation erroneously relied on the rationale of Moody v. Daggett, 429 U.S. 78 (1976) and its progeny[8/] in finding that Petitioner was not entitled to a prompt execution of the warrant. In Moody v. Daggett, supra, the Supreme Court held that a federal parolee serving an

8/ In each of the cases relied upon by the court below in finding no Fifth Amendment violation, the parolee was actually serving an intervening sentence and the warrants were not executed until the expiration of the intervening sentence. See e.g. Reese v. United States Board of Parole, 530 F.2d 231 (9th Cir. 1976) cert. denied, 429 U.S. 999 (1976); United States Ex Rel. Caruso v. United States Board of Parole, 570 F.2d 1150 (3d Cir. 1978) cert. denied, ___ U.S. ___, 98 S.Ct. 2249 (1978).

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intervening sentence for a crime committed while on parole was not constitutionally entitled to a prompt parole revocation hearing where the parole warrant was issued and lodged as a detainer, but was not executed. In Moody, the petitioner was serving an intervening sentence when the United States Board of Parole issued a parole violator warrant and lodged the warrant with prison officials as a detainer. Petitioner had requested the Board to execute the warrant immediately in order that any sentence imposed for the parole violation could run concurrently with his intervening sentence. The Court held that issuance of the warrant, without more, did not trigger any loss of liberty in that the petitioner's confinement was not derived from the parole violator warrant but from his conviction for the crimes committed while on parole.

> "Petitioner's present confinement and consequent liberty loss derive not in any sense from the outstanding parole violator warrant, but from his two 1971 homicide convictions. Issuance of the warrant and notice of that fact to the institution of confinement did no more than express the Board's intent to defer consideration of parole revocation to a later time."
>
> 429 U.S. 86.

Petitioner's plight is clearly distinguishable from Moody in that at no time between issuance of the warrant (August 29, 1977) and execution of the warrant (May 31, 1978) was Petitioner serving an intervening sentence. Although Petitioner was initially taken into state custody on August 26, 1977, he would have been immediately released from such custody

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if the federal detainer had been withdrawn or the warrant executed. The sole reason that he remained in state custody awaiting trail on the new charges was the federal no-bail detainer resulting from the issued, but unexecuted parole violator warrant. Accordingly, the outstanding warrant was the sole cause for his loss of liberty in violation of his due process rights as set forth in Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

Wells v. Wise, 390 F.Supp. 229 (C.D. Cal. 1975) addressed the issue on whether the delay in execution of a warrant violates a parolee's due process rights. In Wells, supra, the petitioner was serving an intervening state sentence when a parole violator warrant was issued against him. The warrant was not executed, however, until he was released from state custody. The parole revocation hearing was held within three months after his retaking by federal authorities. In restoring petitioner to parole, Judge Williams stated at 230:

> "The Government argues that even if Morrissey is applicable, the reasonable time period does not begin to run until such time as the federal authorities actually take custody of the alleged violator. Thus, respondents reason that since petitioner was transferred to federal custody on March 19, 1974 and his hearing was held on June 21, 1974, Morrissey was satisfied.
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> Better reasoning suggests that the reasonable time period mandated by Morrissey begins to run with the 'issuance of a violator warrant (which) triggers a process

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which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch.'"

Similarly, the court in Shelton v. United States Board of Parole, 388 F.2d 567 (D.C. Cir. 1967) stated at 574:

"We think the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch. But what will constitute a reasonable time, will, of necessity, vary with the facts of each case. Obviously, a violator who has succeeded in evading the authorities is in no position to complain of a delay."

See also McCowan v. Nelson, 436 F.2d 758, 760 (9th Cir. 1970); Greene v. Michigan Department of Corrections, 315 F.2d 546, 547 (6th Cir. 1963).

Justice Stevens, in his dissenting opinion in Moody v. Daggett, supra, recognized the right to a prompt hearing and stated at 90-91:

"[S]ince the parole revocation process begins when the Parole Commission issues the revocation warrant, it plainly follows that the constitutional protection afforded the parolee attach at that time. The question, then, is whether the parolee's right to a fair hearing includes any right to have the hearing conducted with reasonable dispatch."

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In this case, there is absolutely no evidence justifying the nine-month delay from the issuance of the warrant (August 29, 1977) until its execution on May 31, 1978. In fact, the delay in retaking Petitioner was precisely the situation that Morrissey v. Brewer and the statutes enacted in response to the Supreme Court's due process requirements (18 U.S.C. § 4214 et seq.) were designed to prevent. Since the execution of the warrant triggers the constitutional and statutory safeguards with respect to timely parole revocation hearings, any unnecessary delay in performing that crucial event totally frustrates the policy of the Act.

The Magistrate obviously relied on the "predictive nature" of parole revocation proceedings in an effort to justify the delay in executing the warrant. [CT 110-11] However, the predictive nature concept is inapposite because the only conduct in question related to the June 21, 1977 conviction, for which Petitioner received summary probation. Since the Commission had not charged Petitioner with the Riverside County burglaries at the time the warrant was issued, and it never charged Petitioner with the Orange County arrest of August 25, 1977, the Commission cannot justify the delay on the ground that it was awaiting disposition on these subsequent charges.

C. The June 9, 1978 Warrant Application Charging Petitioner With his May 30, 1978 Conviction was not Timely Issued.

On June 9, 1978 the Commission, in anticipation of the June 20, 1978 parole revocation hearing, issued an additional warrant application which supplemented the previous application and warrant of August 29, 1977. The June 9, 1978 warrant application added Petitioner's May 30, 1978 conviction on burglary charges in Riverside County as a separate ground of parole

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violation. [AR/Exhibit 14 to Petition] Although this application was issued eleven days prior to the revocation hearing, Petitioner was not served or apprised of the additional charges until a few days prior to the revocation hearing. [CT 72:21-23] The Commission's failure to provide adequate notice of the subsequent charge deprived Petitioner of sufficient time to prepare and present evidence in mitigation of the significance of the supplemental charges. See Morrissey v. Brewer, supra, at 488.

In Kloner v. United States, 535 F.2d 730 (2d Cir. 1976) cert. denied, 429 U.S. 942 (1976), the parolee's revocation was based upon two grounds, only one of which was the subject of notice to the parolee prior to the revocation hearing. The court held that the failure to give written notice of such further ground for revocation violated petitioner's rights to due process under Morrissey and stated at 735:

> "The hearing examiner's summary of decision indicates that the Parole Board based its revocation upon two grounds . . . The second ground, however, was not the subject of any notice to Kloner prior to the revocation hearing, even though the alleged violation apparently was brought to the attention of the Regional Director of the Board of Parole some six month earlier. The failure to include a 'written notice of the claimed violations of parole' violates 'the minimum requirements of due process' outlined by the Supreme Court. See Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499 (1972); cf. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36

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L.Ed.2d 656 (1973) (revocation of probation); Wolff v. McDonnell, 418 U.S. 539, 563-64, 94 S.Ct. 2963, 2978, 41 L.Ed.2d 935, 955 (1974) (prison disciplinary proceedings); Cardaropoli v. Norton, 523 F.2d 990, 996 (2d Cir. 1975) (special offender classifications). While the government emphasizes that Kloner in any event was permitted to rebut both charges once the hearing actually commenced, this opportunity is not an adequate substitute for prior notice, which enables the parolee to 'marshal the facts in his defense and to clarify what the charges are, in fact.' Wolff v. McDonnell, supra, 418 U.S. at 564, 94 S.Ct. at 2978, 41 L.Ed. 2d at 955. Not having been given advance notice, appellant did not have the opportunity, which he now desires, to mitigate the significance of the violation, see Morrissey v. Brewer, supra, 408 U.S. at 488 . . .

The due process requirement of notice, overlooked here, is designed to insure a defendant of the opportunity to prepare and present just such a defense. The denial of due process in this respect was not remedied by giving him proper notice with respect to the first ground for revocation (Kloner's failure to notify parole authorities of his change of address) or by the possible sufficiency of this ground alone to support revocation. Since the Board relied upon both violations as the basis for its deci-

sion, it would be sheer conjecture to speculate what action it would have taken if proper notice had been furnished with respect to the second claim and if the defendant had had the opportunity to prepare and present mitigating evidence in rebuttal. Accordingly, we grant appellant's application for habeas corpus relief insofar as it pertains to the adequacy of his parole revocation hearing. A new hearing may be initiated following the giving of constitutionally adequate notice." (Emphasis supplied)

See also United States Ex Rel. Carson v. Taylor, 540 F.2d 1156, 1159-1160 (2d Cir. 1976).

Similarly, Petitioner was provided with only a few days notice of the claimed violation and it is clear that such notice was not sufficient to enable him to present evidence of facts in mitigation of the charges. For example, the record is clear that the letters from the Orange County Deputy Public Defenders and Deputy District Attorney setting forth Petitioner's cooperation and the basis for the grant of probation were not received until well after the hearing. [CT 17] Obviously, the Commission knew well in advance that the Riverside County charges were pending. Accordingly, the Commission was obligated to provide Petitioner with sufficient notice in order to allow Petitioner adequate time to solicit evidence in support of his claims of mitigating circumstances.

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II

THE PAROLE COMMISSION'S JURISDICTION OVER PETITIONER TERMINATED PRIOR TO THE DATE OF EXECUTION OF THE PAROLE VIOLATOR WARRANT (MAY 31, 1978).

When Petitioner was released on parole on July 1, 1974, his parole expiration date or full term was set at February 16, 1978. [CT 15, AR/Exhibit 11 to Petition] If Petitioner's federal sentence continued running while he was in state custody subsequent to his arrest on August 25, 1977, the Commission's jurisdiction would have terminated on February 16, 1978 which was well before the execution of the parole violator warrant on May 31, 1978 and the issuance of the June 9, 1978 supplemental warrant application.

Although Petitioner acknowledges that he was ultimately credited for this period in state custody against the time he was required to serve as a result of his parole revocation, [CT 20:14-15] this is not the issue. The issue is whether Petitioner continued to serve his federal sentence thereby resulting in the expiration of his sentence on February 16, 1978. If Petitioner's sentence expired full term as of February 16, 1978, the Commission could not have had jurisdiction to execute the warrant and retake Petitioner on May 31, 1978. Additionally, the expiration of Petitioner's sentence on February 16, 1978 precluded the Commission from issuing the supplemental warrant application on June 9, 1978 charging Petitioner with his arrest and conviction of May 30, 1978 on the Riverside County burglary charges.

18 U.S.C. § 4210 provides in pertinent part:

> "(a) A paroleee shall remain in the legal custody and under the control of the Attorney General, until the expiration of

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the maximum term or terms for which such parolee was sentenced.

(b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that--

(1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4164 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision), and

(2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer

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than the maximum term for which he was sentenced in connection with such offense." (Emphasis added)

Although Petitioner was convicted of a state crime subsequent to his release on parole, Petitioner does not fall within the purview of the exception of subsection (b)(2) because he was not punished by a term of imprisonment in any penal facility.[9/]

Similarly, the regulations promulgated pursuant to the Parole Commission and Reorganization Act required Petitioner's continued supervision from August 29, 1977 to May 31, 1978.

28 C.F.R. § 2.46 provides in pertinent part:

"(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or until the warrant is executed, whichever first occurs . . ." (Emphasis added)

During the nine month delay in executing the warrant, the Commission, regardless of its purpose for delay in execu-

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9/ That "punishable by a term of imprisonment, detention or incarceration in any penal facility" does not include pre-conviction jail time is explicity set forth in the legislative history of the statute:

> "The phrase 'punishable by a term of imprisonment, detention or incarceration in a penal facility' is intended by the Conferees to mean by term of confinement which may be levied upon adjudication of guilt or delinquency and does not include detention prior to adjudication."
> House Conf. Rep. No. 94-838, 96th Cong., 2d Sess. 32, reprinted in U.S. Code Cong. & Adm. News 364 (1976)

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tion, was required to continue its jurisdiction of Petitioner. Since Commission jurisdiction was retained, Petitioner's sentence continued to run until the expiration of his full term on February 10, 1978 which was months prior to the execution of the initial warrant and the issuance of the supplemental warrant application. Accordingly, the Commission lacked jurisdiction to execute the warrant after February 10, 1978.

III

THE PAROLE COMMISSION ERRONEOUSLY CONSIDERED PETITIONER'S 1972 DYER ACT CONVICTION IN COMPUTING HIS NEW SENTENCE.

Petitioner's 1972 Dyer Act conviction (Case No. S-1997) expired full term on April 5, 1976. [AR/Exhibit 9 and 26 to Petition] Thus, at all times relevant to the parole revocation proceedings, the Commission was required to disregard the Dyer Act conviction. 18 U.S.C. § 4210.

Although Petitioner acknowledges that neither the Hearing Summary nor the Notice of Action referenced the 1972 Dyer Act conviction [CT 115:9-14], the Sentence Computation Record [AR/Exhibit 26 to Petition] contains a reference to said conviction. As the record is unclear as to whether the Commission considered the expired Dyer Act conviction in computing Petitioner's parole violation sentence, Petitioner is entitled to, at a minimum, an evidentiary hearing on this issue.

IV

THE COMMISSION'S USE OF CURRENT REPAROLE GUIDELINES IN DETERMINING PETITIONER'S PAROLE VIOLATOR SENTENCE VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

In essence, the Ninth Circuit relied solely on its decision in Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978) in concluding that the Commission's utili-

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zation of current reparole guidelines in determining Petitioner's reparole term did not violate the constitutional prohibition against ex post facto laws. Petitioner submits that the Ninth Circuit's reliance on Rifai is erroneous and that the rationale of Rifai is incongruous to other circuit holdings on this issue and therefore a determination by this Court is required.

Petitioner was sentenced on April 6, 1972[10/] pursuant to former 18 U.S.C. § 4208(a)(2) (now section 4205(b)(2)). [AR/Exhibit 9 to Petition] This provision added to the federal sentencing and parole law[11/] a "grant of authority to the sentencing judge [and to] the Board of Parole that would permit release of a prisoner earlier than the one-third point." Garafola v. Benson, 505 F.2d 1212, 1216 (7th Cir. 1974). The provision was expressly added by Congress to provide an alternative to the regular adult sentence (former 18 U.S.C. § 4202), under which a prisoner could not be paroled before the one-third point of his sentence. With the enactment of former 18 U.S.C. § 4208(a)(2), Congress intended to permit the release of a prisoner, irrespective of the portion of his sentence served, when his institutional conduct demonstrated that he was rehabilitated and capable of living in the community without violating the law.

The legislative intent was expressed by the author of the subject section, Representative Emanuel Cellar, Chairperson of the House Judiciary Committee, as follows:

10/ Respondents have not disputed, at any stage of these proceedings, the fact that this sentencing date is the applicable date as far as determining which law should govern.

11/ The prior law provided that parole was available to every federal prisoner serving a sentence of over one year who had exhibited good institutional adjustment and who had served one-third of the total sentence imposed. Act of June 25, 1910, ch. 387, 36 Stat. 819.

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"Section 4202 imposes a purely arbitrary limitation which does not take into account the varying responses which individual prisoners make to the rehabilitation program carried on in our federal prisons. It frequently happens that a prisoner is ready for release before the statutory minimum of eligibility is reached. . . . A prisoner kept beyond that time very often becomes discouraged and bitter, and when he is finally released, the benefit of the program has been lost. . . . These bills are designed . . . to permit the release under supervision at an earlier date should the prisoner's response to the rehabilitation program justify it."

Hearing on H.J.R. 424, H.J.R. 425 and H.R. 8923 before Subcommittee on the Judiciary, 85th Cong., 2d Sess., Ser. 14, 5-6 (1958).

Deputy Attorney General Lawrence Walsh, testifying on behalf of the Justice Department, added:

"The purpose of the bill is to permit a judge to impose on a defendant a sentence with a broad enough range between the minimum and the maximum so that the people who work with him from day to day in the prison can see his progress and pick that very moment when he is best suited to go back to the community and take an active part . . . .

Id. at 8-9.

The House and Senate reports also expressed this legislative intent to allow parole release as soon as rehabilita-

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tive goals were met. See House Rep. No. 1946, 85th Cong. 2d Sess. (1958); Senate Rep. No. 2013, 85th Cong., 2d Sess. (1958).

The court recognized this legislative intent to allow for early release if rehabilitative goals were met when sentencing offenders under former Section 4208(a)(2). Guides prepared for the sentencing judges stressed the use of (a)(2) sentences for offenders who appear to be capable of rehabilitation. See W. Hoffman, "Purposes and Philosophy of Sentencing", 75 F.R.D. 287, 307 (1971).

Thus, Congress intended and sentencing courts have expected that offenders sentenced under former Section 4208(a)(2) would have the opportunity to demonstrate to the Commission, by institutional performance, that they were suitable for early release. Garafola, supra; United States v. Salerno, 538 F.2d 1005, 1008 (3d Cir. 1976). However, a prisoner would be released on parole only when he was rehabilitated and his return to the community would not injure the public's safety. Former 18 U.S.C. § 4203(a) stated these criteria:

> "If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. . . ."

Thus, when Petitioner was originally sentenced, he was "eligible for parole at such a time as the board of parole may

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determine." Former 18 U.S.C. § 4208(a)(2); current 18 U.S.C § 4205(b)(2). The only limitations on the Commission's determination that a prisoner so sentenced was eligible for parole were that there was a reasonable probability that he would live at liberty without violating the laws, and that his release, in the Commission's opinion, was not incompatable with the welfare of society. Former 18 U.S.C. § 4203.

Similarly under former 18 U.S.C. § 4207, with respect to reparole of prisoners after revocation and retaking, "the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced."[12/] Under these statutory standards, the determination whether Petitioner was eligible for release would have been made on the basis of his rehabilitation and parole prognosis, in the discretion of the Commission.

In contrast to the former statutory standards for determining when a prisoner was eligible for parole or reparole, the statute now provides that a prisoner is not to be paroled until the Commission determines that release would not "depreciate the seriousness of his offense or promote disrespect for the law" and "would not jeopardize the public welfare". 18 U.S.C § 4206(a).

The current statutory standards under which Petitioner's reparole was determined evolved from the parole guidelines initially issued on a trial basis in 1973. These initial parole guidelines were the result of the Commission's reevaluation of its process for parole determination. As a result of said reevaluation, the Commission's release policy was changed "from the traditional 'grace' theory to one with emphasis on

12/ Currently, reparole consideration guidelines are set forth in 28 C.F.R. § 2.21.

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the requirements of fairness." P. Tennant, "The U.S. Board of Parole Takes To The Field" 29 Wash. St. Bar News (March 1975) 25, 26. This new emphasis on "fairness" resulted in the issuance of parole release "guidelines."[13/]

The guideline tables eliminate individual prison performance and rehabilitation as the decisive factors in parole release, except negatively, since the parole determination now depends almost entirely on events occurring before incarceration. The formerly decisive rehabilitative factors are given only a glance in the guidelines' assumption that the inmates have "good institutional adjustment and program progress." 28 C.F.R. § 2.20(b).

In 1976, Congress enacted the Parole Commission and Reorganization Act which by its terms evidenced general approval of the 1973 parole guidelines and criteria. Pub. L. 94-233, March 15, 1976, 90 Stat. 219. The Act altered the parole determination criteria from that in former 18 U.S.C. § 4203(a) to criteria which were consistent with the new parole guidelines by adding offense severity to the factors to be considered:

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13/ The new guidelines are set forth in a matrix with two axis, representing the two elements in the parole determination--parole prognosis and offense severity. Parole prognosis elements represent an attempt to gauge the likelihood of the prisoner's success on parole, by utilizing a salient factor score, which consists of an eleven point scale involving certain predictive factors, derived from the prisoner's preincarceration personal history. The salient factor scores are combined for use in the guidelines to form four classes of presumed risk: very good (9-11), good (6-8), fair (4-5), and poor (0-3). The scale thus serves to divide prisoners into groups with presumably varying recidivism rates. However, pursuant to 28 C.F.R. § 2.21 on reparole determination the prisoner is automatically pegged into the poor risk category. The offense severity rating is the second element of the guidelines table. This rating scheme classifies various types of offenses into six categories of differing serverity, as determined by the Commission, ranging from "low" severity (e.g., walkaway escape) to "greatest" severity (e.g., aircraft hijacking).

"If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsection (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released." (Emphasis added)

18 U.S.C. § 4206(a).

Accordingly, when the Commission amended its regulations following enactment of the Parole Commission and Reorganization Act, the tables initiated in the 1973 guidelines were revised and incorporated.[14/] The Commission stated that its offense severity rating "reflected" the statutorily required determination that release would not depreciate the seriousness of the prisoner's offense. 41 Fed. Reg. 19326 (May 12, 1976).

14/ Although the Commission is authorized to make decisions outside the guidelines (18 U.S.C. § 4206(c)) the guidelines determined approximately 88 to 94 percent of all parole release decisions. Geraghty v. United States Parole Commission, 579 F.2d 238, 267 (3rd Cir. 1978) cert. granted, ___ U.S. ___, 99 S.Ct. 1420 (1979); United States v. Salerno, 538 F.2d 1005, 1008 (3rd Cir. 1976); Project, "Parole Release Decision making and the Sentencing Process," 84 Yale L.J. 810, 825 n. 75, 869 n. 293 (1975).

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The issuance of the new parole guidelines in 1973 signaled a singular and radical departure from the previously used rehabilitation model.[15/] United States v. Wallulatum, 600 F.2d 1261, 1262 (9th Cir. 1979) This departure caused Petitioner to serve under a standard of incarceration more onerous than he would have served under the standards in effect when he was originally sentenced in that the new parole determination criteria adds offense severity as a criterion. 18 U.S.C. § 4206(a)(1); Geraghty v. United States Parole Commission, 579 F.2d 238, 265-267 (3d Cir. 1978) cert. granted, ___ U.S. ___, 99 S.Ct. 1420 (1979). As the record establishes, Petitioner's prison performance was exemplary and there was no indication that at the time of the hearing he was not then rehabilitated. Since Petitioner is thus being incarcerated on the basis of administrative and statutory release criteria which have been drastically altered to his detriment since he was sentenced for the subject offenses, the inescapable conclusion is that the Commission's action violated the prohibition against enforcement of ex post facto laws.

Respondents emphasized the point that by virtue of the Commission's action of January 5, 1979, [Appendix to Appellees' Brief] modifying Petitioner's violator term by imposing a new term below the guidelines, Petitioner failed to establish that his term of imprisonment was greater because of the new guide-

15/ The following decisions have held that rehabilitation was the determinate factor in parole release decisions before the issuance of the guidelines: Youth Corrections Act: De Paralta v. Garrison, 575 F.2d 749, 751-52 (9th Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 652-53 (2d Cir. 1977); Adult Indeterminate Sentencing Statute: Garafola v. Benson, supra, at 1217; Kortness v. United States, 514 F.2d 167, 169-70 (8th Cir. 1975); Grasso v. Norton, 520 F.2d 27, 32-33 (2d Cir. 1975); United States v. Salerno, 538 F.2d 1005, 1007 (3d Cir. 1976).

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lines employed. This argument is of no avail in that it is well established that it is the standard of punishment, not the actual punishment, which is subject to constitutional scrutiny. Lindsey v. Washington, 301 U.S. 397, 400 (1937).

In Lindsey, the Supreme Court held that the ex post facto prohibition was violated by a statute that altered a criminal penalty from a one- to fifteen-year sentence to a fifteen-year sentence with possibility of parole, when it was applied to a person who had committed a crime before its enactment. The Court stated:

> "It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of a wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto, . . .regardless of the length of the sentence actually imposed, . . .
>
> * * *
>
> We need not inquire whether this is technically an increase in the punishment annexed to the crime, See Calder v. Bull, supra (3 Dall. 390, 1 L. ed. 650). It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expir-

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ation of the 15-year term." (Emphasis added, citations omitted.)

301 U.S. 401-402.

Respondents' argument and the Ninth Circuit's holding that the Commission's use of the new guidelines does not violate the ex post facto prohibition is based solely on Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978). It is clear that the holding of Rifai has been misinterpreted.

In Rifai, the petitioner was convicted in 1972 for heroin importation and possession and sentenced to ten years; he was subsequently convicted in 1974 for conspiracy to subjourn perjury and obstruction of justice and sentenced to two concurrent five year terms to run consequently with the 1972 ten year sentence. His initial parole hearing was held in December 1976, at which time Rifai was denied parole, notwithstanding his exemplary institutional behavior. The petitioner argued that the use of the 1973 guidelines and the 1976 statutory standards in his parole release determination violated the ex post facto prohibition of the United States Constitution. Respondents assert that Rifai held that the post-1976 parole guidelines were not "laws" for purposes of the ex post facto prohibition. [Appellees' Brief:19] This interpretation of the court's holding in Rifai is clearly erroneous.

A careful review of the decision in Rifai reveals that both the 1973 Commission guidelines and the 1976 statutory standards and guidelines were at issue in the court's determination. In discussing the 1973 Commission guidelines, the court stated:

"The guidelines, therefore, are merely procedural guideposts, without characteristics of laws. See Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977) (the 1973 guide-

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lines are not laws)." (Footnotes omitted)

586 F.2d at 698.

The court was clearly referring only to the pre-statutory 1973 guidelines in that the above-quoted language was prefaced by the introduction "The 1973 Commission Guidelines." 586 F.2d at 697. Thus, the guidelines that the court determined were not laws were the 1973 pre-statutory guidelines, not the current guidelines issued pursuant to 18 U.S.C. § 4203(a)(1). Rifai does not hold that the 1976 statutory changes and parole guidelines established thereunder are not "laws" for purposes of the ex post facto prohibition.

Moreover, assuming arguendo, that Rifai were construed as holding that the use of current reparole guidelines did not violate the ex post facto prohibition, this holding would be in direct contradiction to the weight of authority. A majority of the circuits have held that the change in the parole determination criteria has adversely affected prisoners incarcerated prior to their effective date. Benites v. United States Parole Com'n, 595 F.2d 518, 520-521 (9th Cir. 1979) (youth offender); United States v. Wallulatum, 600 F.2d 1261, 1262-1263 (9th Cir. 1979) (same); De Paralta v. Garrison, 575 F.2d 749, 751-52 (9th Cir. 1978) (same); Shepard v. Taylor, 556 F.2d 648, 652-54 (2d Cir. 1977) (same); United States v. Somers, 552 F.2d 108, 111-13 (3rd Cir. 1977) (Section 4208(a)(1) adult offender); United States v. DiRusso, 548 F.2d 372, 375 (1st Cir. 1976) (dictum) (youth offender); United States v. Salerno, 538 F.2d 1005, 1008-1009 (3rd Cir. 1976) (Section 4208(a)(2) adult offender); Grasso v. Norton, 520 F.2d 27, 32-35 (2d Cir. 1975) (same); Kortness v. United States, 514 F.2d 167, 169-70 (8th Cir. 1975) (same); Garafola v. Benson, 505 F.2d 1212, 1214-19 (7th Cir. 1974) (same). Contra, Ruip v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977) (same).

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The ninth circuit held in White v. Warden, United States Penitentiary, 566 F.2d 57, 62 (9th Cir. 1977) that the Parole Commission and Reorganization Act of 1976 could not be applied retroactively. Similarly, in Geraghty v. United States Parole Commission, 579 F.2d 238 (3d Cir. 1978), cert. granted ___ U.S. ___, 99 S.Ct. 1420 (1979) the court analyzed the effect of the guidelines promulgated pursuant to the Act as follows:

> "From our analysis above, it is clear that the legislature could not retroactively, without offending the ex post facto clause of the Constitution, substantially decrease parole eligibility by legislation. We take it that a similar prohibition applies to an increase in punishment brought about by rule-making, the administrative equivalent of legislation. The legislature cannot, by delegation, escape Constitutional limitations on its power. And to maintain that the present parole guidelines enact no substantial limitation on parole eligibility may well be to misinterpret both the legal and practical effects of the guidelines." 579 F.2d at 266.

See also Warden v. Marrero, 417 U.S. 653, 658-61 (1974) where the Supreme Court held that a denial of parole eligibility was part of the 'punishment' of an offender.

Similarly, the recent opinion of Rodriguez v. United States Parole Com'n, 594 F.2d 170 (7th Cir. 1979) held that the retroactive application of a Commission rule providing for pa-

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role hearings every 18 months (as opposed to the time when the prisoner had served one-third of his sentence) violated the ex post facto clause and thus could not be applied retroactively. In Rodriguez, the petitioner was convicted in early 1977 of crimes committed in 1974 and 1975. In 1977 he was sentenced to a maximum term of two years under former 18 U.S.C. § 4208(a)(2), now 18 U.S.C. § 4205 (b)(2), allowing for immediate parole eligibility. At the initial parole hearing approximately three months after Rodriguez began serving his sentence, the Commission determined that Rodriguez should serve his maximum sentence. Due to a change in Commission rules subsequent to Rodriguez' crimes, Rodriguez was no longer entitled to a subsequent parole hearing at the one-third point of his sentence; he was required to wait 18 months. In holding that this rule change violated the ex post facto prohibition of the Constitution, the Court held:

> "As interpreted in Garafola v. Benson, supra, the predecessor to § 4205(b)(2) required that a prisoner sentenced to a short term thereunder be given a meaningful opportunity for parole release, prior to the one-third point, and a fortiori prior to the expiration, of his sentence. At the time of the offense for which Rodriguez was convicted, any 'punishment' prescribed included such an opportunity for parole release. The retroactive elimination of this opportunity is plainly to his 'substantial disadvantage.'
>
> The legislative history of the Parole Commission and Reorganization Act indicates that Congress viewed the possibility of parole as an element of the 'punishment'

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annexed to any crime: 'Determinations of just punishment are part of the parole process.' H.R.Rep. No. 94-838 (Conference Report), 94th Cong., 2d Sess. 26, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 351, 358. For most prisoners, it is the Parole Commission, and not the sentencing judge or Congress, who determines what any offender's 'punishment' will be:

> Parole is an extension of the sentencing process. The sentences of nearly all offenders include minimum and maximum terms, ordinarily set by the sentencing court within a range of discretion provided by statute. The final determination of precisely how much time an offender must serve is made by the parole authority.

S.Rep. No. 94-369, 94th Cong., 2d Sess. 15-16, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 335, 337."

594 F.2d at 175.

Petitioner submits that his position is substantially similar to the petitioners in De Paralta, Benites and Wallalatum which held that new Commission regulations cannot be applied retroactively. In De Paralta, supra, the petitioner, who was incarcerated under the Youth Corrections Act providing for release upon rehabilitation, argued that the application of the new regulations (promulgated under the 1976 Act), expressly authorizing the Commission to consider offense severity in making its parole release determination, violated both the ex post facto clause and the double jeopardy clause of the Constitution.

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The court held that the regulations issued pursuant to the 1976 statutory amendments could not be applied retroactively to an offender already incarcerated under the Youth Corrections Act, since that Act has previously provided for release when an offender was rehabilitated. 575 F.2d at 751-52. Accord are the holdings in Benites v. United States Parole Com'n, supra, and United States v. Wallulatum, supra. In Benites, the Ninth Circuit held:

> "The district judge was also correct in his characterization of the philosophy of the Youth Corrections Act. The legislative history (1950 U.S. Code Cong. Service, pp. 3983 et seq.) demonstrates that institutional performance was to be the 'primary criterion in determining parole release'. Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978). The youth's rehabilitation was to be the focal point of the hearing. De Peralta v. Garrison, 575 F.2d 749 (9th Cir. 1978); see Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). Severity of the youth offender's crime was 'conspicuously absent' as a factor to be considered in assessing his parole eligibility. Shepard v. Taylor, 556 F.2d 648 (2nd Cir. 1977).
>
> The Commission argues that use of the guidelines in this case was in keeping with parole standards set by the Parole Commission and Reorganization Act of 1976. Clearly, with its enactment, a new philosophy was adopted in which severity of the offense was

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to play a dominant role in determining parole eligibility under guidelines. The 1976 Act was explicitly made applicable to youth offenders. Section 5017 of Title 18 was amended to apply to youth offenders the same criteria for release as were applied to adults. 18 U.S.C. § 4206.

But the 1976 Act is not applicable to this case. Although it was approved on March 15, 1976, its relevant provisions did not take effect until 60 days thereafter, on May 14, 1976. P.L. 94-233, § 16(b); De Peralta v. Garrison, supra. It was thus not even in effect on the date of Benites' parole hearing, on April 30, 1976. Moreover, even if it had been in effect on that date, it could not be applied retroactively in a Youth Corrections Act case without raising fatal ex post facto problems. De Peralta v. Garrison, supra; White v. Warden, 566 F.2d 57 (9th Cir. 1977). Benites was entitled to the benefits of the parole law in effect when he was sentenced in 1974. As the district judge held, institutional performance and rehabilitation were the criteria that should have been employed. (Emphasis added) 595 F.2d 520-521.

Accord, United States v. Wallulatum, 600 F.2d 1261, 1262-1263 (9th Cir. 1979).

The same result follows in the instant case since Petitioner was sentenced under the equivalent adult indeterminate sentencing statute, former 18 U.S.C. § 4208, which is substan-

tially similar to the old Youth Indeterminate Sentencing Law (former 18 U.S.C. § 5010). Under each statute, there was no minimum term and the offender was expected to be paroled when he was rehabilitated.16/

The similarity of the two indeterminate sentence statutes was recognized by the Commission. Former Chairperson of the Commission, George Reed, stated in this regard:

> "Readers who are familiar with the Federal Youth Corrections Act will see much similarity between it and the new adult indeterminate sentencing law. Under that act, and under the new provision whereby the court may specify that the Board of Parole shall determine the date of parole eligibility, the prisoner may be paroled at any time after sentence begins and, except for general law offenders with short sentences, all prisoners in those categories are given initial hearings by the Board as a basis for further review at the appropriate time as determined by the Board, either by personal hearing or by progress report." (Emphasis added)

Reed, "Federal Parole and the Indeterminate Sentence," 23 Federal Probation 12, 13 (Dec. 1959).

The 1976 statute substantially changes the criteria for determining when a prisoner such as Petitioner will be

16/ See fn. 15, p. 38, supra.

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eligible for parole.[17/] The law sets forth specific criteria for making parole eligibility decisions that the Commission must make under 18 U.S.C. § 4205(b)(2) (formerly 18 U.S.C. § 4208(a)(2)). These criteria must be met in each case, unless "good cause" is found. 18 U.S.C. § 4206(a); Geraghty v. United States Parole Commission, supra. The new criteria includes offense severity, a factor not previously included. Consequently, Petitioner, like De Paralta, Benites and Wallulatum, has been denied parole on the basis of new statutory criteria for determining parole eligibility with an indeterminate sentence. See Love v. Fitzharris, 460 F.2d 382, 384-385 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973).

Finally, Petitioner again emphasizes that the standards at issue herein relate to his reparole determination. The initial guidelines issued in 1973 specifically excluded reparole considerations from its purview. 28 C.F.R. § 2.52(f) stated:

> "These guidelines do not apply to parole revocation or reparole consideration. The board shall review the guidelines periodically and may revise or modify them at any time deemed appropriate."
>
> 38 Fed. Reg. 222 (November 19, 1973)

17/ "The legislation [1976 Parole Commission and Reorganization Act] provides a new statement of criteria for parole determinations, which are with the discretion of the agency, but reaffirms existing case law as to judicial review of individual case decisions." (Emphasis added) Cong. Record, Feb. 23, 1976, H1217 at H1221.

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Thus, even at the time of the original revamping of the parole law, the former law apparently applied to reparole determinations. It was not until the 1976 Act was enacted that the guidelines were specifically applied to reparole.[18/]

Thus, by virtue of 28 C.F.R. § 2.21(b)(2) automatically placing him in a "poor risk" category, Petitioner had absolutely no opportunity to present evidence that his parole prognosis might be "fair", "good" or even "very good" based on his salient factor score.[19/]

Accordingly, the fact that Petitioner is placed in the "poor" parole risk category without any individualized determination made as to his parole prognosis establishes even more

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18/ 28 C.F.R. § 2.21(b) and (c) provides:
"(b)(1) If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct, the appropriate severity rating for the new criminal behavior shall be calculated. New Criminal conduct may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at revocation hearing. As violations may be for state or local offense, the appropriate severity level may be determined by analogy with listed federal offense behaviors.
(2) The guidelines for parole consideration specified at 28 CFR 2.20 for the poor parole risk category shall then be applied. The original sentence type (i.e., adult, youth) shall determine the applicable guidelines for the parole violator term. Time served on a new state or federal sentence shall be credited as time in custody. This does not affect the computation of total violator term as provided by §§ 2.47(b) and (c) and 2.52(c) and (d).
(c) The above are merely guidelines. A decision outside these guidelines (either above or below) may be made circumstances warrant. For example, violations of an assaultive nature, or violations by a person with a history of assaultive conduct or by a person with a history of repeated parole failure may warrant a decision above the guidelines. Minor offense(s) (e.g. traffic infractions, disorderly conduct) shall normally be treated under administrative violations." (Emphasis added)

19/ The Salient Factor score which Petitioner apparently would have received is 7, placing him in the "good" parole prognosis category. As his offense severity was set at "high" because he was convicted of multiple burglaries, his guideline term could have been set at 20-26 months rather than 34-44 months. [CT 99]

clearly that the standards under which his reparole was determined were more onerous than the prior standards.

In conclusion, it is clear that the 1976 Parole Commission and Reorganization Act and the regulations promulgated thereunder altered, to Petitioner's detriment, the standards upon which Petitioner's reparole determination was made. Therefore, the enforcement of such reparole standards violated the ex post facto prohibition of the Constitution.[20/]

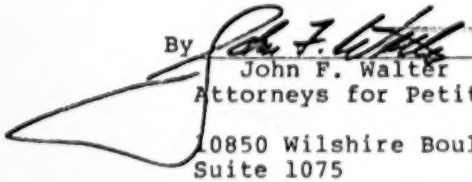
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: January 2, 1980.

Respectfully submitted,

JOHN F. WALTER
WALTER, FINESTONE & RICHTER

By 
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20/ Petitioner is fully aware of this Court's holding in United States v. Addonizio, ___ U.S. ___, 60 L.Ed.2d 805 (1979) which held that the Commission's post-sentencing policy change beyond that intended by the trial judge did not support a collateral attack of the original sentence under 28 U.S.C. § 2255. However, the Court expressly stated in its Opinion that it did not consider whether the new Commission procedures violated the ex post facto clause. 60 L.Ed.2d at 810.

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SEP 19 1979
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SEP 14 1979
EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL JOSEPH PORTLEY, Appellee,	)	No. 79-2504
v.	)	
LAWRENCE GROSSMAN, et al., Appellants.	)	
DANIEL JOSEPH PORTLEY, Appellant,	)	No. 79-2505
v.	)	
LAWRENCE GROSSMAN, et al., Appellees.	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: WRIGHT and GOODWIN, Circuit Judges, and SOLOMON,* District Judge

Daniel Joseph Portley appeals that part of the judgment denying habeas relief, and the government appeals that part of the judgment granting partial relief by ordering the Parole Commission to reconsider Portley's eligibility for parole under standards in effect in April, 1972, instead of the standards currently in effect.

Taking Portley's appeal first, we find no error. Portley has challenged the proceedings under which the Parole Commission prepared and executed warrants charging him with violations of his federal parole (by committing

*The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

FPI-SS-12-2-78

state crimes). The facts were fully examined by the district court magistrate and reviewed by a district judge. The Parole Commission acted within its jurisdiction and within the applicable statutes and regulations. That part of the judgment denying Portley's petition is affirmed.

The government's appeal requires reversal of that part of the judgment ordering reconsideration under 1972 standards. This case is controlled by the recent decision of this court in Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978).

Rifai had not been decided when this case was before the district court. It is now clear, however, that the use of current parole guidelines for an adult offender does not violate the rule against ex post facto laws.

To the extent that the judgment granted Portley relief against the Parole Commission, it is reversed.

FPI-SS-12-6-78

FILED

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CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANIEL JOSEPH PORTLEY, Petitioner, v. LAWRENCE C. GROSSMAN, Warden, et al., Respondents.	CV 78-2907-LEW(T) REPORT AND RECOMMENDATION OF MAGISTRATE

This Report and Recommendation is submitted to the Honorable Laughlin E. Waters, United States District Judge pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 104 of the United States District Court for the Central District of California.

On July 27, 1978, petitioner, a federal prisoner in custody at the Federal Correctional Institution, Terminal Island, California, was permitted to file his Petition for Writ of Habeas Corpus in forma pauperis, pursuant to 28 U.S.C. §1915(a). On August 21, 1978, respondent filed his Response to Petition for Writ of Habeas Corpus. On September 5, 1978, petitioner filed

his Traverse to the Response.

On September 27, 1971, following his plea of guilty to 18 U.S.C. §495 (forgery and uttering forged treasury check) and 18 U.S.C. §1708 (unlawful possession of check), petitioner was sentenced to a term of ten years. The sentence was then suspended and petitioner was placed on probation for a term of four years.

On April 6, 1972, petitioner's probation was revoked following his guilty plea to 18 U.S.C. §2312 (interstate transportation of a stolen motor vehicle), and petitioner was sentenced to a term of six years for his original conviction, and for a four year concurrent term for violation of 18 U.S.C. §2312.

Petitioner was released on parole on July 1, 1974, with a parole expiration date of February 16, 1978. Thereafter, petitioner was arrested on March 30, 1977, and charged with assault with a deadly weapon. On June 21, 1977, following his plea of guilty to this charge, petitioner was fined one hundred dollars and placed on a three year summary probation.

Petitioner was then arrested by Santa Ana police on August 25, 1977, and charged with receiving stolen property and possession of a firearm. He was booked into the Orange County Jail the next day.

A federal parole violator warrant was issued against the petitioner on August 29, 1977, upon an application which alleged petitioner had violated the conditions of his parole by incurring a conviction for drawing, exhibiting, or using a firearm or deadly weapon in self-defense. (Exhibit 13 of Petition)

On May 30, 1978, following his plea of guilty, petitioner

was convicted of three counts of burglary and sentenced to five years summary probation. The federal parole violator warrant was then executed on May 31, 1978, and a supplemental warrant application was filed on June 9, 1978, adding the allegation of the burglary conviction. (Exhibit 17 of Petition)

On June 20, 1978, a parole revocation hearing was held. At this hearing petitioner admitted the convictions for arms violation and burglary. (Exhibit 2 of Petition) Based upon his admissions and the convictions of record, the Parole Commission revoked petitioner's parole, did not credit petitioner with time spent on parole, and continued petitioner to a presumptive parole on August 20, 1980. (Exhibit 4 of Return)

The Commission issued a Notice of Action which gave the following explanation for its action:

"REASONS FOR CONTINUANCE

1. Your parole violation behavior has been classified as new criminal conduct of high severity because you were convicted of multiple offenses including burglaries while on parole. You have been in state and federal confinement as a result of your violative behavior for a total of 10 months.

2. Reparole guidelines (20 CFR 2.21) indicate a customary range of 34-44 months to be served before re-release: After review of all relevant factors and information presented, a decision outside the guidelines does not appear warranted.

4. (sic) As required by law, you have also been scheduled for a statutory interim hearing during

December, 1979." (Exhibit 4 of Return)

Petitioner filed his first Petition for Writ of Habeas Corpus in this Court in November, 1977, under case number CV-77-4223-MML(T). His sole claim in that petition was that certain jail time spent in state custody in 1970-1971 should have been credited to his federal convictions and sentences imposed on September 27, 1971. The petition was dismissed on March 1, 1978. Petitioner appealed the judgment of dismissal, and on June 20, 1978, the United States Court of Appeals for the Ninth Circuit dismissed his appeal, but noted that petitioner was not precluded from filing a "further and separate" petition. (Exhibit 20 of Petition)

Petitioner has now raised the following contentions in his instant petition:

1. Parole was revoked in violation of the Sixth Amendment right to due process and 18 U.S.C. §4214(a)(1)(B).

2. Since the sentence for his April 6, 1972, conviction (No. S-1997) (violation of 18 U.S.C. §2312) expired prior to the parole revocation hearing, the Commission should not have considered it at the hearing.

3. Time recently spent in jail under state custody was not credited to his parole violator term, in violation of Bureau of Prisons policy.

4. The parole violator term is excessive, in violation of the Eighth Amendment.

DISCUSSION

In his first ground, petitioner claims that he was not afforded a full and timely parole revocation hearing. He asserts that under 18 U.S.C. §4214(a)(1)(B), his parole revocation hearing

should have been held within sixty days of his June 21, 1977, state conviction for drawing, exhibiting, or using a firearm.

Section 4214 states in pertinent part that:

> "§4214 Revocation of parole
>
> (a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have -
>
> (A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole;
>
> * * *
>
> (B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing."

No preliminary hearing was required here since a state criminal conviction constitutes probable cause under subsection (b)(1):

> "Conviction of a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section . . ."

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While §4214(a)(1)(B) states that a revocation hearing must be held within sixty days of a determination of probable cause, this requirement is subject to the exception provided under subsection (c), which states in pertinent part: "Any alleged parole violator who is summoned or retaken by warrant under section 4213 . . . shall receive a revocation hearing within ninety days of the date of the retaking." (Emphasis added)

The petitioner was not retaken under the August 29, 1977, parole violator warrant until May 31, 1978. (See Exhibit 16 of Petition) The parole revocation hearing which was held on June 20, 1978, was clearly within the ninety day time limit prescribed by §4214(c). Thus, petitioner is incorrect in claiming that the hearing was not timely.

Petitioner contends further in his Traverse that the parole violator warrant must be filed within sixty days of a new conviction. In this case, he claims that the warrant filed on August 29, 1977, should have been filed on or before August 20, 1977. Ostensibly, the petitioner relies upon Section 4214 as his authority. (Traverse, pp. 3-4) However, Section 4214 states no requirement as to when a parole violator warrant must be filed. The preceding section, §4213, states under subsection (b):

> "Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons

or warrant may be suspended pending disposition of the charge."

While the warrant is required to be issued "as soon as practicable" under this section, the petitioner is incorrect in asserting that it must be issued within sixty days.

Additional claims also related to this first ground of the petition are made in the Traverse. Petitioner contends that Moody v. Daggett, 429 U.S. 78 (1976), cited by respondent (Return, p. 4), is distinguishable from the instant petition. In Moody, the petitioner was on federal parole when he was convicted and sentenced on federal manslaughter and homicide charges. The Parole Commission issued a parole violator warrant and lodged it as a detainer with the prison. The petitioner requested that the warrant be executed so that any imprisonment imposed for violation of his earlier parole could run concurrent to his intervening homicide sentences. The Commission refused, stating that it would execute the warrant only upon his release from the intervening sentences. The petitioner then filed a writ of habeas corpus on grounds that he had been denied a prompt revocation hearing.

The Supreme Court denied the writ, holding that the mere issuance of a parole violator warrant did not mandate an immediate parole revocation hearing since the issuance of the warrant did not deprive the parolee of any constitutionally protected rights. Moreover, the Court held that there was no constitutional duty to provide the parolee with an adversary hearing until he was taken into custody as a parole violator by execution of the warrant.

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"[E]xecution of the warrant and custody under that warrant [is] the operative event triggering any loss of liberty attendant upon parole revocation. . . [L]oss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant." 429 U.S. at 87.

Thus, Moody is authority directly contra to the petitioner's claim that the revocation hearing was not timely. Petitioner attempts to distinguish Moody on grounds that there the parolee was serving an intervening sentence, whereas here the petitioner was merely in jail awaiting trial on the burglary charges. (Traverse, pp. 6-7, 10-12)

While the petitioner is correct in pointing out this factual distinction between Moody and the instant petition, it does not follow that the holding of Moody is inapplicable to the instant petition. In Moody, the Court held that it was appropriate for the revocation hearing to be held after the intervening sentence: "Given the predictive nature of the [revocation] hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate -- at the expiration of the parolee's intervening sentence." 429 U.S. at 89. This procedure has been followed recently in United States ex. rel. Caruso v. United States Board of Parole, 570 F.2d 1150, n. 9 at 1154 (3d Cir., 1978). The reasoning of the Court was as follows: "For predictive purposes, the Commission has no choice but to await expiration of an intervening sentence so as to have the parolee's institutional record. It would not make sense to conclude that when a warrant is issued while a parolee is awaiting

disposition of local charges that a revocation hearing be given prior to the trial of those charges. Indeed, under the authority of Moody, had the petitioner here been sentenced to state prison rather than granted five years probation, the revocation hearing held on June 20, 1978, would not have even been held until after expiration of the sentence.

Furthermore, it is clear from Parole Commission guidelines that a revocation hearing need not be held until after a parolee is tried for local charges, since under 28 C.F.R. 2.21(b)(1), a severity rating is calculated for new criminal conduct. "New criminal conduct may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at a revocation hearing." (Emphasis added)[1]

The next claim made by the petitioner in his Traverse relates to the first ground of the petition, that petitioner was denied his right to "reasonable notice" of the burglary charges in the supplemental warrant application, insofar as the supplemental warrant was filed on June 9, 1978, or merely eleven days prior to the revocation hearing of June 20, 1978. Petitioner cites as authority for this claim Williams v. New York, 334(sic) U.S. 241 (Traverse, p. 9). Since that case does not involve parole revocation hearings, it is inapposite authority. Also without merit is petitioner's contention that the "untimely notice" given by the supplemental warrant was in violation of the due process requirements of Morrisey v. Brewer, 408 U.S. 471 (1972). While Morissey holds that written notice of the claimed violation of

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1/ See footnote 3, infra.

parole is required, it does not set forth time requirements for the filing of such notice.

Moreover, the Parole Commission did not act outside established guidelines. Under C.F.R. §2.44(b), the warrant need not have been issued until after the petitioner's conviction for the burglary charges; since that Section provides in part that "issuance of a summons or warrant may be withheld, or a warrant may be issued and held in abeyance pending disposition of the charge." (Emphasis added)

Petitioner further contends that he was "led to believe" that the Commission would only consider his June 21, 1977, conviction, and not his May 30, 1978, conviction for burglary. Also, since the warrant charging the latter conviction was not issued until June 9, 1978, petitioner claims that he lost witnesses who might otherwise have been of help to him (Traverse, p. 9).

Petitioner is incorrect in asserting that "in any case where it is alleged that witnesses became lost due to some unreasonable delay, release is in order." (Traverse, p. 9) In fact, Sherman v. Hirshman, 427 F.Supp. 12 (D.N.J. 1976), cited by petitioner, does not support this proposition.

Petitioner claims that he had lost witnesses who would have presented evidence of mitigating circumstances at the revocation hearing with respect to the burglary conviction. The mitigating circumstances to which petitioner refers concerns his contention that he and his family were threatened by a certain Charles Thomas Miller, allegedly member of the "Mexican Mafia," in order to gain petitioner's cooperation to participate with Miller in committing

burglaries throughout Orange and Riverside counties. (See pages 14 and 23 of the Traverse, Exhibits 19 and 21 of the Petition, and Exhibit 28 of the Traverse.) Petitioner does not expressly refer to any particular individuals who could have presented evidence relating to the claimed mitigating circumstances, nor does he make any express reference as to what testimony they could have offered at the revocation hearing which might have been helpful, in view of the fact that petitioner was convicted of the charge.

A reasonable inference, however, can be made from the Traverse (at page 10) that petitioner is referring to certain Orange County authorities as among his "lost" witnesses, namely the Orange County Public Defender and the Orange County District Attorney. Letters from both agencies were submitted to the Parole Commission subsequent to the June 20, 1978 revocation hearing which substantiate that petitioner was cooperating in efforts to prosecute Charles Thomas Miller, and that Miller had indeed threatened petitioner (Petition, Exhibits 19, 21; Traverse, Exhibit 28).

There is no evidence, however, these witnesses were lost due to delay in the issuance of the supplemental warrant. The petitioner does not contend, nor does the evidence presented in any of the Exhibits, including the letters mentioned above and the Parole Commission's Hearing Summary (Petition, Exhibits 19, 21; Traverse, Exhibit 28; and Return, Exhibit 2), reveal that the petitioner made an effort to present the testimony by the authors of the letters, and that such effort was then thwarted by the "untimely" filing of the supplemental warrant. Moreover, the petitioner does not demonstrate that he was substantially

prejudiced by the absence of additional testimony.[2]

Petitioner has not offered any facts to support the claim that other witnesses or evidence may have been lost due to the delayed issuance of the warrant. Since the petitioner pleaded guilty to the burglary charges, the Parole Commission officers who conducted the revocation hearing were "fairly entitled to assume that all evidence upon which the parolee was legally entitled to rely was presented and considered." Reese v. United States, 530 F.2d 231, 234 (9th Cir.,1976). The petitioner has not demonstrated facts to rebut this presumption, and it has already been pointed out in the above discussion that the Commission acted within the guidelines when it delayed issuance of the supplemental warrant. Therefore, the petitioner's right to due process was not violated. Moreover, there is evidence that the Commission was aware of the fact that petitioner had cooperated with Orange County authorities to some extent in the past.

2/ A careful review of the Commission's Hearing Summary and the three letters submitted by Orange County authorities on the petitioner's behalf (Petition, Exhibits 19, 21; Traverse, Exhibit 28; Return, Exhibit 2) reveals that the letters do not add any facts relating to the circumstances of the burglaries which were not presented at the hearing by the petitioner and his two witnesses (his sister and his fiance). In fact, the Hearing Summary (Petition, Exhibits 19, 21; Traverse, Exhibit 28; and Return, Exhibit 2) provide a fairly detailed account of these circumstances.

Petitioner's further contention in relation to the first ground of the petition, that the Commission was required to review its August 29, 1977, parole violator warrant which was lodged as a detainer against petitioner while he was in jail awaiting disposition of the burglary charges (Traverse, p. 14), is without merit since petitioner was not serving an intervening sentence, bu was merely in jail awaiting trial.

The second and third grounds of the petition are also without merit. The Parole Commission's Hearing Summary of the revocation hearing and the Notice of Action have been carefully reviewed (Return, Exhibit 4). It is clear from these documents that the Commission did not consider petitioner's conviction of April 6, 1972 under 18 U.S.C. §2312 (the "Dyer Act") in its decision at the revocation hearing.

Petitioner admits that he has been given proper jail time credits for time spent in jail between September 1, 1977, to May 31, 1977 (Traverse, p. 15 and Petition, Exhibit 26). Whether petitioner could have been "retaken" by the Parole Commission, pursuant to 18 U.S.C. §4213, while he was in jail awaiting trial, has already been answered by the above discussion of Moody v. Daggett. Under the authority of Moody, it was proper for the Parole Commission to await disposition of the local charges agains the petitioner before executing the parole violator warrant. The rule of Moody has been extended to include federal parolees being held in state custody for state offenses. United States ex. rel. Caruso v. United States Board of Parole, 570 F.2d 1150 (3d Cir., 1978); Hicks v. United States Board of Parole, 550 F.2d 401 (8th Cir. 1977); Coronado v. United States Board of Parole,

551 F.2d 274 (10th Cir.,1977); Head v. United States Board of Parole, 553 F.2d 22 (7th Cir.,1977). Therefore, whether or not petitioner may have been physically available to be retaken by federal authorities is irrelevant.

The petitioner's final ground for relief, that his new parole violator term is excessive and therefore in violation of the Eighth Amendment, is based on petitioner's contention that the Commission's decision to set reparole at 34 to 44 months was an abuse of discretion (Traverse, p. 16).

However, petitioner also contends that the Parole Commission applied 28 C.F.R. §2.21, which provides reparole guidelines, in violation of recent cases, DeParalta v. Garrison, 575 F.2d 743 (9th Cir., 1978), and White v. Warden, 566 F.2d 57 (9th Cir., 1977). In White, the court expressly held that the 1976 Parole Commission and Reorganization Act is not to be applied retroactively. This holding was reaffirmed in DeParalta.

DeParalta concerned an initial parole review hearing in which the Parole Commission denied parole release based upon its application of guidelines promulgated pursuant to the 1976 Act to the petitioner's 1973 conviction and sentence. The court held that the Commission should have applied the law in effect at the time the petitioner had been sentenced. 556 F.2d at 751.

Unlike DeParalta, the instant petition concerns a parole revocation hearing rather than initial consideration for parole release. However, a case recently decided in this district, Karl Edward James v. Lawrence Grossman, No. CV 78-2987-LEW(S), (October 4, 1978), extended the rule of White and DeParalta and made it applicable to parole revocation settings as well. In James

the petitioner was a federal parolee who was originally sentenced in 1970. Subsequent to a state conviction and sentence in 1976, the Parole Commission revoked his parole and set reparole according to current guidelines. In his Report and Recommendation, the Magistrate discussed the DeParalta holding and found that DeParalta "specifically prohibits the application of regulations adopted pursuant to the Parole Commission and Reorganization Act to a person who was sentenced before the Act became law." (Report and Recommendation on Petition for Writ of Habeas Corpus by a Person in Federal Custody, James, supra, at 10.) Moreover, relying on Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972) (per curiam), vacated and remanded with directions to dismiss as moot, 409 U.S. 1100 (1973) (but cited in Warden v. Marrero, 417 U.S. 653, 663 (1974), the use of current guidelines by the Parole Commission to determine reparole eligibility of a person sentenced prior to the 1976 Act was found to violate the constitutional prohibition against ex-post facto laws.

In the instant petition, it is obvious that the Parole Commission relied upon the current guidelines with respect to its decision as to a reparole date:

> "2. Reparole guidelines (28 C.F.R. §2.21) indicate a customary range of 34-44 months to be served before re-release: After review of all relevant factors and information presented, a decision outside the guidelines does not appear warranted." (Notice of Action, Return, Exhibit 4)

In view of the precedent which has been established in James, relying on White, DeParalta, and Love, the Magistrate agrees

with the limited holding of James that the Parole Commission must reconsider and determine petitioner's eligibility for reparole by applying the law in effect when petitioner was sentenced in April, 1972.

Moreover, the Magistrate believes that the decision should be limited to the facts of this case. Thus, in so ordering the Parole Commission to reconsider the petitioner's reparole eligibility, the Magistrate does not recommend that all use of current Commission guidelines to federal parolees sentenced prior to the 1976 Act shall be barred. Rather, this ruling merely holds that current Commission guidelines may not be used to determine reparole eligibility of persons sentenced prior to May 14, 1976, the effective date of the 1976 Parole Commission and Reorganization Act.

Therefore, this decision shall not extend to the Commission's revocation of the petitioner's parole since it does not appear that the decision to revoke was influenced by the current guidelines. Therefore, petitioner is not entitled to a new parole revocation hearing. Rather, the purpose of the Writ will be served if this Court orders the Parole Commission to disregard its guidelines and to reconsider and determine petitioner's parole eligibility under the standards for reparole in effect when the petitioner was sentenced in April, 1972.[3]

3/ This conclusion and order of the Magistrate may appear to be inconsistent with earlier discussion, supra, at 10-11, where it was noted that the Parole Commission was justified under the present guidelines in both delaying the issuance of the supplemental

Finally, petitioner points out that the presumptive parole date was set for August 20, 1980, while his mandatory release date has been computed as May 5, 1980. (Traverse, pp. 21-22 and Exhibit 27) This decision is incongruous. If the Parole Commission decides

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3/ (cont.) warrant application and in delaying the revocation hearing as well. However, use of the guidelines [specifically, 28 C.F.R. §2.21(b)(1) and §2.44(b)] in these contexts is quite consistent with the Supreme Court's reasoning in Moody v. Daggett, supra.

Moody held that because of the predictive nature of a parole revocation hearing, it was appropriate for the hearing to take place after a parolee's intervening sentence for new criminal conduct. A fortiori, it was appropriate for the Parole Commission to await disposition of the local charges against the petitioner since consideration of new criminal conduct as grounds for parole revocation may depend upon whether or not a conviction results.

Furthermore, application of the Commission's guidelines in this context does not run afoul of the constitutional prohibition against ex post facto laws. Again, this follows from Moody, where the Supreme Court wrote that:

> "With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which Morrisey v. Brewer sought to protect . . . .[L]oss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant." 429 U.S. at 86-87.

to set a reparole date when it reconsiders the petitioner's parole eligibility, then it would be appropriate to set a date prior to the mandatory release date. However, it should be noted that under the former 18 U.S.C. §4207 in effect at the time of petitioner's sentencing (subsequently repealed by the 1976 Act), the Parole Commission could require petitioner to serve out the remainder of his sentence.

The Magistrate finds that by reason of the foregoing, it appears from the application that petitioner is entitled to relief from this Court.

IT IS THEREFORE RECOMMENDED that the Court issue an Order directing the United States Parole Commission to reconsider and determine petitioner's eligibility for reparole under the standards for reparole in effect when petitioner was sentenced in April, 1972 within ninety days of service of judgment. In all other respects it is recommended that the Petition for Writ of Habeas Corpus be denied.

DATED: November 3, 1978

Venetta S. Tassopulos

VENETTA S. TASSOPULOS
United States Magistrate

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and am counsel of record for Petitioner herein. On this 2nd day of January, 1980, one copy of the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was mailed, postage prepaid, at Los Angeles, California as follows:

Eric L. Dobberteen, Esq.
Assistant United States Attorney
1200 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct.

JOHN F. WALTER